Appeal No. 34716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

STANLEY W. DUNN, JR., and
KATHERINE B. DUNN,

Appellants,

v. Civil Action No. 06-C-282

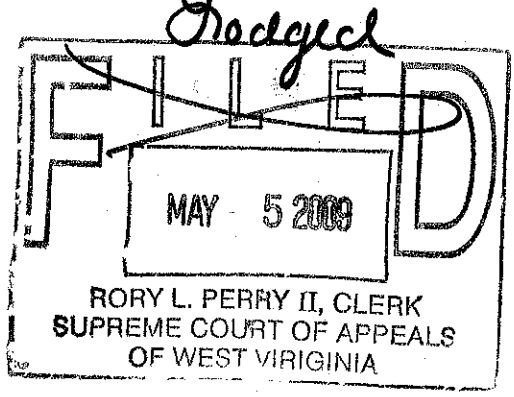
CAROL ROCKWELL, and
MARTIN & SEIBERT, L.C.,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA
THE HONORABLE DAVID H. SANDERS, JUDGE

BRIEF OF DOUGLAS S. ROCKWELL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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I. Statement of the Kind of Proceeding and Nature of the Ruling Below

On August 21, 2006, Stanley Dunn and Katherine Dunn, instituted a civil action against Douglas S. Rockwell, Carol

Rockwell and the law firm of Martin & Seibert, in the Circuit Court of Jefferson County, West Virginia. The Dunns alleged numerous causes of actions with the trial court finally concluding on June 12, 2008, that Martin & Seibert was entitled to a judgment in its favor as a matter of law and on August 13, 2008, that Carol Rockwell was entitled to a judgment in her favor as a matter of law.

The trial court reached this conclusion and entered these orders based upon the sworn admissions of Stanley Dunn and Katherine Dunn. In the August 13, 2008, order granting a judgment as a matter of law in favor of Carol Rockwell the trial court concluded as follows:

> "From the evidence before the Court, it appears the Plaintiffs knew of Mrs. Rockwell's acquisition of the disputed property no later than September 29, 2003. See Katherine Dunn Depo. P. 64; Stanley Dunn Depo., pp. 34-36, 43, 74, 111. Because they knew of Mrs. Rockwell's acquisition of the disputed property on or before September 29, 2003, their claims accrued under the 'discovery rule' on that date and became time-barred on September 30, 2005.
>
> Furthermore, none of the Defendants took any action to prevent or delay Plaintiffs' filing of this suit. See Katherine Dunn Depo. pp. 68-69, 81; Stanley Dunn Depo., pp. 81-82, 128. Because Plaintiffs did not file suit until August 21, 2006, their claims against [Carol K. Rockwell] are time-barred even after applying the 'discovery rule'."
>
> Order Granting Defendant Martin & Seibert's Motion to Amend Judgment on Each

of Plaintiffs' Claims Against Martin & Seibert dated June 12, 2008, entered June 19, 2008, pp. 6-7.

Order, Jefferson County Civil Action No. 06-C-282 dated August 13, 2008. Stanley Dunn and Katherine Dunn now seek this Court's review of these Orders.

II. Statement of Facts

For the purposes of this response, Douglas S. Rockwell incorporates herein all of the Statement of Facts contained in the Response of Carol Rockwell. Further, Mr. Rockwell asserts that the only facts necessary in considering this petition for appeal are the admissions contained in the sworn testimony of Stanley Dunn and Katherine Dunn.

The deposition of Stanley Dunn was taken on January 24, 2008. During Mr. Dunn's deposition he stated as follows:

> *A*...All we knew was when I dealt with Hugh Hoover, when he asked permission to buy some property from Mr. Walters at the back of Mr., or around Mr. Walters' property. I met with Hugh, and I'm not sure if it was at his house or at the Walters' property, but he told me that they wanted more to go around it and I said well, how much is it, Hugh and he said well, they don't want too much, just a little bit to add to the house. And I said to Hugh, Hugh, I don't mind you taking something behind their lot that's going up the hill, but do not take anything in this parcel, the dogleg parcel between Rockwell and Walters. And he just looked at me real funny said, Stanley, I think it's already taken.
>
> *Q*...How did you respond?

A...I was stunned and I thought for a minute and I thought well, this is not Hugh's fault. I told him what Mr. Rockwell and I had agreed to.

Q...What did you do next?

A...I thought about it a lot and I decided it might be best in my interest to wait and not say anything, because Mr. Rockwell had kind of tried to guide the Hoover Farm from Mr. Yonkers and his group, he might try to guide it away from me, to make his contract good.

Q...So, did you do any investigation into that?

A...No, sir, I let it go. I thought the Statute of Limitations ran for three years and thought I was good.

Q...So, you knew you had a potential claim against Mr. Rockwell at that time didn't you?

***

A...I new there was a possibility. I was hoping it was only a misunderstanding, we were good friends and that we would be able to solve this real easy, but in case we couldn't, I was going to be safe to buy the rest of the Hoover Farm.

Q...So, then your wife was correct, your wife was correct that in September of 2003 you knew that you had the potential for a dispute with Mr. Rockwell?

***

Q...Could be. But you knew something was out there, the potential?

A...That's correct.

Q...And what I'm understanding from you is that you didn't do anything to investigate that, at that point?

A...No, sir, I was too busy with everything else and didn't know whether it was going to go through or not...

The deposition of Katherine Dunn was also taken on January 24, 2008. Ms. Dunn likewise agreed that she and her husband knew that they had a potential dispute with Mr. Rockwell at least by September of 2003.

Q...So, you do acknowledge that you and your husband were aware of Mrs. Rockwell's acquisition of the property in dispute by September, I think, 29th of 2003?

A...Okay, yes.

Q...Now, so by that date I take it you and your husband knew that something was wrong?

A...That's correct.

Q...Once you realized that something was wrong in September of 2003, did you undertake any investigation to find out anything more about Mrs. Rockwell's acquisition?

***

A...No, not that I can remember.

Q...Did you speak with her about it?

A...I don't think so.

Q...Do you recall speaking with Mr. Rockwell about it?

A...No.

Q...What about the sellers, do you recall speaking with Mr. Hoover and Ms. Gray about it back then?

A...No, I didn't speak to them.

Q...And I take it you didn't, yourself, consult any land records?

A...No.

Q...Do you know whether Mr. Dunn spoke with Mrs. Rockwell back in the September 2003 time frame, when you all realized something was wrong?

A...I don't think so.

Q...Do you know whether he spoke with Mr. Rockwell about it, to attempt any further investigation?

A...No.

Q...What about Mr. Hoover and Mrs. Gray, do you know whether your husband spoke with either of those folks back then?

A...No, I don't.

Q...Now, did Mr. Rockwell, Mrs. Rockwell or Martin & Seibert, to your recollection, do anything to hinder or impede your ability to conduct any further investigation back in the September 2003 time frame, once you knew there was something wrong?

A...No.

***

Q...Are you aware of Mr. Rockwell, Mrs. Rockwell or Martin & Seibert doing anything to impede your husband's ability to undertake any additional investigation back in September of 2003, once you learned something was wrong?

A...No.

These admissions form the basis for the trial court's determination that Stanley Dunn and Katherine Dunn knew at least by September 29, 2003 that they had a potential claim against Douglas S. Rockwell, Carol K. Rockwell and/or Martin & Seibert, L.C. Accordingly, the trial court's orders should be affirmed.

III. Points and Authorities

Federal Cases

Feddersen v. Garvey, 427 F.3d 108 (1st Cir. 2005)

State Cases

Aetna Cas. & Surety Co. v. Federated Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)

Cart v. Marcum, 188 W. Va. 241, 423 S.E.2d 644 (1992)

DeLeo v. Nesubaum, 49 Conn. Supp. 366, 888 A.2d 189 (2004)

Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008)

Gaither v. City Hospital, Inc., 199 W. Va. 706, 487 S.E.2d 901 (1997)

Harrison v. Seltzer, 165 W. Va. 366, 268 S.E.2d 312 (1980)

Legg v. Rashid, 222 W. Va. 169, 663 S.E.2d 623 (2008)

McCoy v. Miller, 213 W. Va. 161, 578 S.E.2d 355 (2003)

Morgan v. Grace Hospital, Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965)

Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)

Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996)

VanSickle v. Kohout, 215 W. Va. 433, 599 S.E.2d 856 (2004)

Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995)

State Statutes and Regulations

West Virginia Code § 55-2-12

IV. Discussion

A. Standard of Review

As the Circuit Court entered summary judgment in favor of Carol Rockwell and Martin & Seibert, L.C., this Court's review is de novo. Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). This Court has previously held that a motion for summary judgment should be granted only when it is clear there genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Aetna Cas. & Surety Co. v. Federated Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963). However, in Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995), this Court explained that:

> Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

In Legg v. Rashid, 222 W. Va. 169, 663 S.E.2d 623 (2008), this Court determined that summary judgment was appropriate with respect to the determination of whether the plaintiff filed a claim within the appropriate statute of limitations. This Court determined that summary judgment was appropriate as the Court's ruling was based

upon admissions of the plaintiff. The Court's rulings in the instant action are also based upon admissions of the plaintiffs as to the date upon which they knew they had a potential claim, September 29, 2003.

In this action, summary judgment determining, based upon the admissions of Stanley Dunn and Katherine Dunn, that the Dunns knew of the potential claim against the defendants at the latest by September 29, 2003, was appropriate. Accordingly, this action filed on August 21, 2006 was not timely filed and the Circuit Court's Order should be affirmed.

B. The Statute of Limitations with Respect to the Claims Asserted by Stanley Dunn and Katherine Dunn Accrued When They Knew of Their Potential Claim on September 29, 2003, Therefore, this Civil Action Filed on August 21, 2006 Was Untimely.

The statute of limitations with respect to the claims asserted by Stanley Dunn and Katherine Dunn (hereinafter "Dunns"), controlled by West Virginia Code § 55-2-12. Pursuant to this statutory section the Dunns must have filed their action within two (2) years of when the cause of action accrued, which based upon their actual knowledge was September 29, 2003.

West Virginia Code § 55-2-12 has been judicially modified to include what is commonly referred to as the "discovery rule". See Cart v. Marcum, 188 W. Va. 241, 423 S.E.2d 644 (1992); Gaither v. City Hospital, Inc., 199 W. Va. 706, 487 S.E.2d 901 (1997). The "discovery rule" provides that the statute of limitations is tolled

until a claimant knows or by reasonable diligence should know of his or her claim. Cart v. Marcum, 188 W. Va. 241, 423 S.E.2d 644 (1992). This Court has emphasized that the focus is on the plaintiff's state of mind, "on whether the injured plaintiff was aware of the malpractice or, by the existence of reasonable care, should have discovered it." Harrison v. Seltzer, 165 W. Va. 366, 268 S.E.2d 312 (1980).

With respect to the "discovery rule" this Court has stated that mere ignorance of at the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations. Gaither v. City Hospital, Inc., 199 W. Va. 706, 487 S.E.2d 901 (1997). The "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury. Cart v. Marcum, supra.

In Gaither v. City Hospital, Inc., 199 W. Va. 706, 487 S.E.2d 901 (1997), this Court recognized that the "discovery rule" has its origins in the fact that many times an injured party is unable to know of the existence of any injury or its cause. This Court held in Gaither, that in a tort action, unless there is a clear statutory prohibition to its application, under the "discovery rule" the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know:

(1) that the plaintiff has been injured;

(2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty; and,

(3) that the conduct of that entity has a causal relation to the injury.

This rule tolls the statute of limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury.

The admissions during the sworn testimony of Stanley Dunn and Katherine Dunn establish that at least by September 29, 2003, the Dunns were aware of the following:

(1) that they had been injured, i.e. property which they asserted was held by them pursuant to an option agreement was purchased by Carol Rockwell;

(2) the identity of the entity who owed the plaintiff a duty to act with due care and who may have engaged in conduct that breached that duty, i.e. the plaintiffs were well aware of the identity of all of the parties involved in the transaction including, but not limited to, Douglas S. Rockwell, Carol K. Rockwell and Martin & Seibert, L.C., as well as Mr. Hoover and Ms. Gray; and,

(3) that the conduct of that entity as a causal relation to the injury i.e. the Dunns were aware that property which they asserted was held by them pursuant to an option agreement with Mr. Hoover and Mrs.

> Gray was purchased by Carol Rockwell through the actions of Douglas S. Rockwell and allegedly, Martin & Seibert, L.C.

The Circuit Court properly determined that the Dunns knew all of the causes of action asserted in their complaint filed on August 21, 2006 at least by September 29, 2003. Accordingly, the Dunns failed to present their claim within the appropriate statute of limitations.

C. The "Continuous Representation Doctrine" Does Not Apply to Toll the Statute of Limitations Regarding the Dunns' Claim Because They Knew They Had a Potential Claim at Least by September 29, 2003.

This Court recognized the "Continuous Representation Doctrine" in Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996). The "Continuous Representation Doctrine" as applied to lawyers and the "Continuous Medical Treatment Doctrine" as applied to the practice of medicine, toll a statute of limitations until the termination of the professional relationship with respect to the underlying malpractice claim. Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008).

This Court should clarify its decision in Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996) and determine that under the circumstance presented in this action the "Continuous Representation Doctrine" has no application where the client actually knows that they suffered appreciable harm as a result of the complained conduct. If the client has such knowledge then

there is no innocent reliance on the professional which the "Continuous Representation Doctrine" is designed to protect. Feddersen v. Garvey, 427 F.3d 108 (1st Cir. 2005).

As recognized by the Superior Court of Connecticut in DeLeo v. Nesubaum, 49 Conn. Supp. 366, 888 A.2d 189 (2004), once the plaintiff has discovered the actionable harm the public policy behind the "Continuous Representation Doctrine", the preservation of the continuing professional relationship and the ability to remedy the created harm, is no longer served. Further, it allows as here, the alleged grieved party to act in their best interest to the detriment of the principles underlying the statute of limitations potentially creating greater liability and exposure.

The "Continuous Representation Doctrine" is designed, in part, to protect the integrity of the professional relationship by permitting the allegedly negligent professional to attempt to remedy the effects of the malpractice and provide uninterrupted service to the client. Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996). In this action there was no continuing relationship to protect. The Dunns knew on or before September 29, 2003 of the property purchase by Ms. Rockwell and delayed filing this civil action, not to permit Mr. Rockwell to continue to represent them, but for their own economic benefit.

In Smith v. Stacy, supra., this Court stated that the "Continuous Representation Doctrine" may apply even where the client has actual knowledge of the alleged negligent act. However, in VanSickle v. Kohout, 215 W. Va. 433, 599 S.E.2d 856 (2004), this Court held that the statute of limitations in a legal malpractice claim is not tolled during the pendency of the parties effort to reverse or mitigate the harm through administrative and/or judicial appeals. Accordingly, with this Court's decision in VanSickle v. Kohout, supra., actual knowledge on the part of a client for the purposes of application of the "Continuous Representation Doctrine" should be reevaluated, especially in the circumstances presented herein.

This modification of the decision in Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996), is mandated in the interest of consistency with this Court's application of the "discovery rule". In McCoy v. Miller, 213 W. Va. 161, 578 S.E.2d 355 (2003), this Court held that where a plaintiff knows of his injury, and the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the facts surrounding that potential breach. Permitting a person with knowledge of a claim to circumvent that obligation under the "discovery rule" based upon the "Continuous Representation Doctrine" is unwarranted.

This Court recognized that the basic purpose of the statute of limitations is to encourage promptness in instituting actions; to suppress stale demands or fraudulent claims; and, to avoid inconvenience which may result from delay in asserting rights or claims where it is practicable to assert them. Morgan v. Grace Hospital, Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965); VanSickle v. Kohout, 215 W. Va. 433, 599 S.E.2d 856 (2004). In this action, the Dunns admitted that they were aware of the issue that is at the heart of this civil action, at least by September 29, 2003.

They further admitted they did not pursue the claim within two (2) years of that time as they did not believe it was in their best interest. As in VanSickle v. Kohout, this Court should not ignore the principles underlying the statute of limitations and adopt an entirely different statute of limitations for lawyer malpractice actions.

Of additional import regarding the application of the "Continuous Representation Doctrine" to this action is the admonishment by this Court in Smith v. Stacy, 198 W. Va. 498, 482 S.E.2d 115 (1996), that there must be a clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney. This Court went on to state that the "Continuous Representation Doctrine" does not toll the statute of limitations where an attorney's subsequent role is only tangentially related to the legal representation the attorney

provided in the matter in which the attorney was alleged to be negligent. Further, the inquiry is not whether an attorney/client relationship still exists on any matter or even generally, but when the representation of the specific matter concluded.

This Court reemphasized this principle in VanSickle v. Kohout, 215 W. Va. 433, 599 S.E.2d 856 (2004), and stated that:

> where an attorney's subsequent role is only tangentially related to the action that involved the malpractice, or when the continuing representation is merely continuity of a general professional relationship the statute of limitations is not tolled.

In this instance, the basis of the claim against Mr. Rockwell and subsequently against Ms. Rockwell and the law firm involves the preparation of a generic option agreement which was provided to the Dunns. The Dunns then filled in any and all pertinent information during direct negotiations with the seller.

It is uncontroverted that Mr. Rockwell did not participate in the negotiations with the seller. Accordingly, under these circumstances where Mr. Rockwell prepared only a generic option agreement; the Dunns were aware of any potential claim on or before September 29, 2003; and, there were no ongoing legal issues in which Mr. Rockwell represented the Dunns regarding this option agreement, the "Continuous Representation Doctrine" should not apply to extend the statute of limitations beyond two (2) years from September 29, 2003.

CONCLUSION

For all of the foregoing reasons, Douglas S. Rockwell, respectfully requests that the Circuit Court's orders of June 12, 2008 and August 13, 2008 be affirmed.

Dated this 4th day of May, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2009, I served the foregoing **BRIEF OF DOUGLAS S. ROCKWELL** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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